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CRIMINAL ANTHROPOLOGY IN ITS RELATION TO CRIMINAL JURISPRUDENCE.

CRIMINAL anthropology, or criminology, is a science, if one may call it such, of but recent development. Considering its subject-matter, and the number and prominence of its advocates, it is perhaps more intimately connected with criminal jurisprudence than with any other science. Although criminal anthropology is closely related to many other fields and lines of thought and work, the object here is to show its relation to jurisprudence only; and as a consequence other of its important lines of work are omitted in this discussion.

While criminal anthropology pursues its distinct method of investigation, and adopts an entirely different basis from that of jurisprudence, it is wholly dependent upon the latter, and can be of but minor practical service, except through the channels of legislation and the courts of justice. Law determines who shall constitute the criminal class upon the theory of the protection of society, and criminal anthropology, accepting this definition, attempts to determine the causes of crime, and the methods best adapted for its repression and prevention. It will be seen from its object that, if this science can be placed upon a sound foundation and some of the nonsense eliminated which characterizes it, as all new sciences, its service, in relation to the administration of justice, will be inestimable. In order to show the relation in which the two now stand it will be necessary to sketch the origin and development of each.

Criminal anthropology is a branch of sociology, and its purpose[1] is to investigate crime scientifically: to study its origin and causes, and to determine, if possible, what proportion of responsibility belongs to society and what to the criminal. The remedies are to be examined as well as the causes, and also the effect of punishment as a means of reformation and prevention. From the nature and extent of its work, criminal anthropology may be said to comprehend three parts — general, special, and practical. The first consists in a summary and classification of all the facts known, and is used as the basis for further work; the second includes the investigation of individual criminals,

[1] *Cf.* MACDONALD, *Abnormal Man;* WILSON, report on "Criminal Anthropology" (*Smithsonian Report*, 1890).

historically, physically, psychically, and socially, with a view to their analysis and the determination of the causes of crime; while the third embraces a consideration of methods and institutions for the repression and prevention of crime. Criminologists thus become those who study crime with reference to its origin, propagation, prevention, and punishment.

The origin of criminal anthropology[1] under this title may be said to have been in 1885, when the First International Congress of Criminal Anthropology was held at Rome. Its antecedents were the investigations of and published results in Morel's *Traité des dégénérescences physiques, intellectuelles, et morales de l'espèce humaine, et des causes qui produisent ces variétés maladives*, in 1857; Darwin's *Origin of Species*, in 1859; Spencer's *First Principles*, in 1862; Despine's *Psychologie naturelle*, in 1868; Maudsley's *Responsibility in Mental Disease*, in 1872. The precursor in associations was the establishment by Broca in Paris, in 1859, of an anthropological society having a branch of criminal anthropology. The needed impulse for a centralization of these studies was given by the publishing of Lombroso's works, the first, *L'Uomo Delinquente*, appearing in 1876. Lombroso and his associated school of criminal anthropologists, including Italian scientists and jurists, may thus be called the innovators of the science, although it existed in fragments previous to their work.

It is, perhaps, unfortunate that at the beginning of the science two opposing schools should have arisen, Lombroso and the Italians leading the one, the French the other. It will be necessary to examine the beliefs and methods of each, for the lines of reform suggested are different, and if either predominates, the recommended changes in law and procedure will vary, and the future of the science accordingly change.

The Italian school emphasizes the biological, pathological, and atavistic side, and would account for the presence of crime and distinguishing characteristics of criminals upon these bases. In this belief, the investigations have been principally along anatomic lines,[2] the

[1] *Cf.* FERRI, *Criminal Sociology; Smithsonian Report*, 1893 (section on "Criminal Anthropology"); MACDONALD, *Criminology*.

[2] This in itself has induced much hostile criticism of the Italian school, by the general public, and it has been charged by those who would consider only more conspicuous data that criminal anthropology narrows crime down to the mere results of conformation of skull and convolutions of the brain. These in themselves are merely morphological observations and but preliminary steps, although not generally so regarded by critics of the school.

assigned reason being that the organ must be studied before the function and the physical before the moral. It has continually sought to ally the criminal with animals and barbaric peoples. One of its principal assertions is that the criminal is a man of arrested development, and harmonizes with the civilization of previous decades rather than with the present one; that modern civilization has so rapidly advanced that it exceeds the natural capacity of many individuals who live in its midst. With this anatomical or biological basis in view, an extended series of anthropometrical measurements and psychological experiments,[1] *e. g.*, of hearing, sight, touch, smell, sensibility to locality, pain, pressure, etc., have been taken, and a comparison has been made with similar measurements of and experiments upon normal persons. From the results of this laboratory work the school has announced what it defines as a criminal type, and asserts that all born criminals have characteristic anomalies either physical or mental. The former most frequently refer to the cranium and face, the latter to defective intelligence and absence of moral sensibilities. Criminals are divided into the two categories of "born" and "occasional," although the more accurate division into born, insane, occasional, and habitual criminals, and criminals by passion, is used by some criminal anthropologists.

The born criminal is asserted to possess the criminal type, or at least some of the specified anomalies. There is a tendency to allege that the occasional criminal may also possess them, although not to so great a degree. The effect of environment is not absolutely excluded, but is considered as of minor importance. Atavism is one of the pivots of the thought of this school. So strongly is the biological side emphasized that it is asserted that "the great under-class of criminals have defective organisms, especially in relation to the brain and nervous systems, and that they are all more or less deficient in moral sense. They are perversely wicked, ignorant, and have a bad heredity." Consequently not much stress is placed upon reform, but primarily upon prevention. These conclusions of the school are the result of the most elaborate and assiduous investigation, and are supported by the prestige of prominent scientific names.[2]

The French school is the result of a dissent from the Italian. While admitting the importance of the anatomical and physiological

[1] *Cf.* LOMBROSO, *Female Offender; L'Uomo Delinquente.*

[2] The prominence given by this school to anatomy, physiognomy, etc., has been the cause of much misapprehension and misunderstanding, and has induced a belief in the existence of no small degree of nonsense in the new science. Many rash state-

study of the criminal, they deny its precedence. Instead, they emphasize the psychological and sociological, and hold that the criminal should be studied as a member of the social organism; that he is equally the product of heredity and environment. Lacassagne, a prominent exponent of this school, has said: "Every society has the criminals that it deserves, and there is something radically wrong in the organization of the state." They deny that a criminal presents any peculiar anatomical characteristics, or that there exists a criminal type. They have less sympathy with the study of the body, physiognomy, speech, handwriting, sensibilities, etc., than with the study of social institutions and the environment and heredity. They believe the great causes of crime are to be found not so much in an innate tendency to commit crime as in a lack of resistance to the pressure of social and physical life. They assert that three-fourths of the criminals are such by occasion, and are not so born, and deny that crime is a disease, or is due to disease. In support of this denial they rely upon prison statistics, which show that 82 per cent. of the prisoners incarcerated are in good health. They hold that the criminal is only *slightly* abnormal, and show that of those who are guilty of crimes as many are at large in society and are classed as normal as are incarcerated in penal institutions, the ratio of convictions to crimes committed being less than one-half. The French faction characterizes Lombroso's theory as "a revival of the empiric science of phrenology," and the Italian results are deemed inconclusive because "the series of observations is limited, processes defective, methods dissimilar, and the observers inexperienced." Little importance is attached to the theory of atavism or regression. Love of pleasure, aversion to labor, defective social institutions, bad financial administration, are among the alleged causes of crime. Consistent with these views is the fact that all socialists interested in the work are adherents of the French school. No laboratory work has been done by this faction, as the causes are not

ments have been made, similar to Lombroso's recent one in a work upon *Chirography*, where he said it is possible to distinguish a criminal by his handwriting; and also in a recent meeting, where it was declared that at no distant day a criminal might be recognized and convicted by his physiognomy and the shape of his cranium. Whatever may be the possibilities, science as such is not concerned with them, and the public is not prepared for the unauthenticated statements which in many instances are based upon meager observations of normal persons with which comparisons have been made. The hasty and extreme conclusions formed by this school have done much to bring the science into the disfavor which to some extent it possesses, and to characterize its members as inaccurate in their work.

sought in the individual alone. Manouvrier and Lacassagne may be said to be the present leaders of this school.

While the two factions are thus radically opposed in both methods and conclusions, the tendency during the past five years has been to coördinate all theories,[1] and to consider crime as the result of multifarious causes—anthropological, physiological, and sociological; and in this union and harmonizing of the work of criminal anthropology lies its main advantage and possible assistance in criminal-law reform. The great progress of the work, as conducted by both schools, and the intercourse and discussion afforded by the meetings of the Congress of Criminal Anthropology, have been very influential in producing this result.

Having outlined the origin and development of criminal anthropology, it will be necessary to glance hastily at the other important element of the discussion—criminal jurisprudence. The purpose of the following outline is not to give a historical survey of the development of the system, but to show the *idea* of crime, its origin, and the methods employed for its repression; to show the various stages through which crime has passed and the beliefs held, according to the degree of knowledge incident to the period. For this purpose a division is made into four stages—that of revenge or retribution, repression, reformation, and prevention.

Criminal law had its origin[2] in the necessity for preserving peace and harmony as civilization progressed and social life became complicated. It is that branch of jurisprudence which relates to the definition and punishment of acts or omissions which are attacks upon public order; abuses or obstructions of public authority; actions injurious to the public generally; attacks upon the persons and property of individuals, or rights connected with them.

In all the primitive relations of mankind revenge was one of the predominating principles, and was executed first by the individual, then by the clan or family, and finally delegated to the community and to the state. Crime was undefined or uncodified. The rule of procedure was the simple one that whatever injury was done by one individual to another, or by one clan to another, could be expiated by similar injuries or by warfare. The early penalties, if they may be called such,

[1] *Cf. Report of Criminal Anthropological Meeting*, 1897; *Report of United States Commissioner of Education*, 1893–4, chaps. 14, 15; 1889–90, chap. 18.

[2] *Cf.* CHERRY, *Growth of Criminal Law;* STEPHENS, *History of Criminal Law in England*, Vols. I, II; WINES, *Punishment and Reformation;* MAINE, *Ancient Law.*

were death and mutilation, and a gradual substitution of a system of fines for the less serious offenses. Private warfare and blood feuds were the rule, and organized revenge[1] was the principle predominating in primitive justice. Moral rights were unrecognized, and force was the only method of offense or defense. With the development of community life it was found impracticable and inexpedient for every injured individual or family to pursue, capture, and wreak vengeance upon the perpetrator of an injury, and the gradual delegation of the right to the chief or sovereign was substituted. Specific crimes were declared, and certain chosen representatives administered, not justice in the modern sense, but vengeance, which was the prevailing sentiment of the one injured. Many of the crimes and punishments of primitive law exist today almost unchanged, but are administered with a different knowledge and purpose. The rule then, as now, was, "the greater the crime, the greater the penalty."

The procedure corresponded to the *idea* of crime, and consisted primarily in nothing more than private warfare. From this it developed into the law of infangthef, which was a recognition of the *right* of the injured party to exterminate the offender or receive compensation for the act. Sir Francis Palgrave observes upon this point: "Perhaps the name legal procedure can scarcely be given with propriety to these plain and speedy modes of administering justice; they are acts deduced from the mere exercise of the passions natural to man, and the law consists only in the restrictions by which the power of self-protection was prevented from degenerating into wanton and unprovoked cruelty." Following infangthef came the development of police organization, purgation, ordeal, and trial by combat. The last three were characteristic of the early courts or tribunals where the trial was conducted. These latter were at first only public meetings for the adjustment of personal difficulties. Accusation by either a committee appointed for that purpose or a private accuser was the method of indictment, and the receiving of testimony was common in these primitive courts. The idea of revenge as the permanent factor in early punishment of crime is clearly brought out by a study of the methods of trial and punishment.

The second period is dominated by the idea of repression, not unmixed, however, with that of vengeance. The repressive theory in existence at this period differs from the present one in the idea of

[1] This is not unknown today, as is illustrated by the Mafia of Italy and the well-known "vendetta."

intimidation which was so prominent during the Middle Ages. The characteristic feature of this period may be said to differ from the retributive one in that the former consists in the desire for retributory punishment — the desire for indemnity for the past — while the purpose of the latter is to gain security for the future. This is the *idea* which divides the first period from the second.

This second period is characterized by a rapid growth of institutions and a marvelous development of community life. Crime became specifically defined in decrees and laws, and sovereignty attained its greatest height, while with it grew much of the oppression and unfairness which distinguished the administration of justice. In the first place, the state or sovereign had gained absolute control of the punishment of the criminal as a natural consequence of the solidarity of families and communities, and this exclusive right, theoretically at least, was administered in the interest of peace. From the keeping of the king's peace, therefore, grew the modern theory of the protection of society.

The procedure was distinguished by the most unjust proceedings, and the barbarous punishments and the cruelty of this period far exceed that of any other in the history of law. The sovereign or state was everywhere paramount, and individual rights, when in opposition to the sovereign, were not recognized. Death, torture, and mutilation were the penalties, and bills of attainder and numerous ingenious forms of summary proceedings existed. The union of church and state brought within the law a vast number of crimes, and persecution was a dominant feature of the legal system. The idea of reforming or "curing" the criminal was just dawning, and the belief was that it could be done by terrorizing or through intimidation. The extortion of confessions by means of torture, the ingenuity of which has never been surpassed, condemnation without trial, rules of evidence enabling convictions and making them possible without arraigning the accused, severe penalties for misdemeanors, and unrestrained capital punishment, were among the characteristics of this period. Crime was the *willful* act of the individual, environment and heredity as factors in producing crime being unrecognized. The only question was as to the guilt of or the utility of removing the accused for political or personal reasons. No mitigating circumstances were possible. Insanity was confounded with religious beliefs, and made its possessors objects of persecution rather than furnished a defense. The number of capital offenses, including religious crimes, at one time in England exceeded 160, and

all punishments were enforced where the ecclesiastical courts had jurisdiction. As a result, revolutions, revolts, fanaticism, and suppressions of all kinds existed, and it was this condition which furnished the reaction of the reformative period.

In the injustice of the laws of the Middle Ages is found the root of the development of trial by jury, the present system of appeals, appearance by counsel, right to a speedy and public trial, right of being confronted by the accuser, rules relating to incriminating evidence and conviction upon one's own confession, or that of accomplices, and many other rules of law and evidence. To this source may be traced, also, the abolition of crimes of religion, the abatement of the severity of punishment, and the separation of church and state which are found in the present century. The reformative tendency became well defined about the middle of the eighteenth century. Contemporaneous with, and incident to, it was the development of the prison system. Previous to this time prisons existed, but not as places of detention for punishment or reform. They were used merely as temporary places of detention for those awaiting sentence to execution, exile, transportation, or release. Imprisonment was not in itself a punishment. Together with the prison system came the establishment of asylums, workhouses, and reformatories. Insanity was recognized as a defense, and the study of the causes of crime and the nature of the criminal was entered upon. For the first time the idea of vengeance seemed disappearing in the background of history, and science and knowledge were supplanting fanaticism, superstition, and persecution. Education, moral training, discipline, were being introduced where only punishment and extermination had hitherto existed.

In contrasting this period of reform with that of repression, we find in the former the most absolute safeguards thrown up about the criminal, the state handicapped, and the most liberal rules applying to the defense. Nearly all of the present rules of evidence, which are so obnoxious to criminal anthropologists, can be traced to the reaction against the atrocities of the Middle Ages and to the determination to prevent a continuance of the "star chamber" methods. There remain, however, to a great degree, the same system of punishment, somewhat humanized, and the same disregard of the criminal and his surroundings which existed in the previous stages of the development of criminal law.

We have designated three periods of criminal law, using the idea

of crime in punishment rather than giving a historical survey. The fourth period — that of prevention — is just dawning, and it is not safe to say that it is well out of the meshes of the idea of reformation. The idea of reform is still the dominant one, and is but slowly developing into reform as a means of prevention. To prevent the commission of crime is novel, and is very far removed from our hasty survey of vengeance. Prevention differs from reformation in this: the object is the good of society, the individual being but slightly considered in the former. In the latter society is considered, but the individual also is an important element. If society is best benefited by reforming the criminal, this is the better method; but if incapable of reform, then permanent incarceration or extermination — which is prevention. In preventing crime, the criminal and causes of crime are studied, and an attempt made to remove the latter; if this is not possible, then of necessity the criminal must be removed. Whatever the causes, *he* must not be permitted to continue a *probable* career of crime or beget a family of paupers, idiots, or criminals. Criminal anthropology may be said to be the herald of this idea of preventing crime, but it is certain that the idea is becoming a firmly rooted one. Reformatories and prisons are necessary elements of this system, but they are places for discipline and education, not for punishment. A system of scientific jurisprudence is essential to any prevention of crime, and all of the reforms proposed by criminal authropologists are characteristic of this period. All the suggested changes in criminal law are based upon this idea of prevention.

Criminal-law legislation, as enacted at present, is upon the basis of reform, and remains upon the same foundation as was primitive law — that in its application the act and not the individual should be the object to which attention was directed. The idea dominating the repressive system has been outlined in the discussion of the work of the criminal anthropologists. It is not a mere revision of the system of criminal law and procedure, but that legislation may be influenced in many other lines. It is necessary that the great causes of crime should be reached, and until then the criminal must be kept from them. The basis of the preventive system is a consideration of the individual rather than of his act, and of his relation to the social whole. This is a radical departure from the dominant idea in criminal-law legislation during the previous three periods. The ideas of vengeance, repression, and reform have been logical developments into each other, and have been upon the common legal theory. They are closely related, and

have been so intermingled that it is impossible to distinguish the exact period when each began. With the preventive system there can be no such harmonious development; for, while it is the logical result of the increasing knowledge and development of social and political life, it requires a change of the fundamental principles governing the system of criminal law.

In this outline of crime and punishment the attempt has been to outline the development of the idea of crime and punishment, and to show the position of criminal anthropology as being the summit in the evolution of the thought regarding it.

We have outlined the two systems so as to see the different theories, the origin of each, and their mutual relation. Before passing to a consideration of the reforms demanded, it will be necessary to glance more specifically at the doctrines of criminal anthropology which are the basis for reform. These doctrines are founded upon the researches into history, the study of the individual in the laboratory and in society, and of social and legal institutions. As a result of this study, in which almost every known science has been utilized, the necessity has been perceived of working through the channels of legislation and the courts of justice, in order to remedy certain existing evils, and to this end certain defects are pointed out and substitutions recommended, in accord with modern thought and knowledge. The knowledge of man and society which forms the present basis of the law's operation should be superseded by the modern enlightened ideas, for the faulty systems of criminal jurisprudence are the greatest detriment in the way of decreasing the amount and causes of crime, and are to a great extent responsible for the increased amount of litigation between the state and the criminal.

In reflecting upon the right of the criminal anthropologists to claim these reforms (which right may be questioned, by reason of the comparatively short time that the science has been in existence, and because of the limited amount of work performed), it must be remembered that in America the work is less strongly organized and has not attained the prominence or commanded the attention that it has in Europe. The workers are, for the greater part, mere names to most Americans, while in Europe they are in the closest relation with the people and with the government. The interest there is incessant, and does not depend upon reports and occasional congresses, but upon constant research and experiments. By reason of the few translations of reports and publications of the students and investigators in criminal

anthropology, there is not the interest and coöperation in America which would otherwise obtain. Americans, as a rule, are familiar only with the Italian school, the study and theories of the sociologists and psychologists being unknown. The "criminal type" is considered here as the pith of the whole science, and its establishment as a fact is regarded as the object of all investigation, whereas it is only one of the most debatable theories, is only inconclusively proved, and is so recognized in Europe. The increased amount of English writing and translation is tending to remove these erroneous, narrow views, and thus to establish a less critical and more scientific attitude.

The following is a brief résumé of the conclusions of the criminal anthropologists:[1]

1. Criminal anthropology renounces entirely the law of retaliation as the end, principle, or basis of judicial punishment.

2. The purpose of punishment is the necessity of protecting society against the consequences of crime, either by moral reclamation of the criminal or by his removal from society. Punishment is not for the purpose of satisfying vengeance.

3. Society should have legal rights and privileges equal to those of the criminal, and systems and institutions should be modified to conform to this view. An absolute equality for each should be maintained.

4. In criminal anthropology it is not sufficient to study the fact of crime. The criminal must also be considered. It has become necessary to define the causes which produce crime, to study the sphere of action of the criminal, as well as to give attention to measures for the safety of society against his acts. Criminal anthropology does not study him in the abstract and speculate over his guilt and responsibility, but it analyzes him according to results of purely scientific investigation and with the aid of exact methods.

5. In crime the results of two factors are seen reciprocally reacting: (1) the individual peculiarities in the nature of the criminal, or his psychophysical organization; (2) the peculiarities of external influences, such as climate, country, social surroundings, etc.

6. Relying upon exact methods, criminal anthropology reveals the criminal as possessing an organization more or less unfortunate, vicious, impoverished, ill-balanced, defective, and not adapted to struggle with surrounding conditions, and, consequently, incapable of maintaining the struggle in legally established ways. This defect of adaptation varies with conditions.

7. The causes of crime are three: immediate, which arise from the character of the individual; remote, which are found in his unfavorable surroundings, under the influence of which organic peculiarities are developed into

[1] *Cf. Report of United States Commissioner of Education*, 1893–4, p. 1684.

more or less constant criminal agents; predisposing, which push these ill-proportioned and viciously developed organizations toward crime.[1]

8. Basing crime on scientific grounds, criminal anthropology has for its purpose a fundamental study of the actual criminal and his crimes as ordinary phenomena, which it must investigate throughout their whole extent, from their genesis to their free growth and development; and thus the phenomenon of crime is united with great social questions and legal systems. Based upon these principles, criminal anthropology logically recognizes an absence of reason in the repressive measures determined in advance, as to their duration and specific character. On the contrary, it affirms the necessity of studying individual characteristics before rendering decisions. The terms of punishment should endure so long as the causes exist which necessitate them, but they should cease with the causes.

9. Biological and anthropological studies are indispensable for placing penal legislation upon a solid foundation.

10. The certainty, not the severity, of punishment operates as a deterrent in crime, prevention being the object of punitive measures.

Upon theories and conclusions so radically different as those of criminal jurisprudence and criminal anthropology it is difficult to see a means of reconciliation. The hope lies in the fact that the theories are more diverse than the methods of practical work, since jurists are to some extent recognizing the same evils and recommending similar remedies. In theory the one system is scientific, the other legal; one considers the individual and his environment, the other considers only the act; one is the result of a comparatively modern study of man and institutions, the other is based upon necessity and relies on the precedent of centuries and on rules venerable for their antiquity; the one is revolutionary, the other conservative; one is the result of the study of society and individuals, and consists largely of theories or propositions, the value of which is unknown, as they are mainly untested, while the other arises from the necessity of protecting society, and has already demonstrated its priority and efficiency in the matter of protection.

[1] In his admirable work upon *Punishment and Reformation*, Mr. F. H. Wines, among many other classifications, divides the causes of crime into individual, social, and cosmical. In enumerating the causes, he adopts an excellent method by using first those relating to the individual, as physical and mental desires; then broadening into those relating to the family, as education, discipline, etc. Following this are those of the community, as poverty, wealth, density of population, employment, rural or urban life, etc.; and from this into the social and political whole, which includes legislation, government, war, etc.

In nearly all of the reforms suggested and enumerated hereafter some legislative action has been taken, varying in the different countries, but jurisprudence has made the attempt alone, and not by indorsing the theories of criminal anthropology. The tendency is, however, for jurists and scientists to unite in the effort for reform, and at the Third International Congress of Criminal Anthropology, held at Brussels, one of the distinctive features was the prominent part that jurists took in the deliberations and debates.

In dealing with the specific reforms advocated, it has been thought advisable to use the United States as illustrative, by reason of the increased facility for study, and because the majority of the rules of procedure and laws in force reflect the attitude and progress of other civilized countries. Although there is a greater diversity of law and decisions, owing to the prevailing systems of state government, the purpose is to show the extreme limit to which legislation has gone in advancing the work of criminal anthropologists, and the main obstacles which arise and prevent its further progress. In matters of advanced penology the United States ranks among the first. It must be remembered that these reforms are not urged each by itself, but as parts of a system; that, while one country may represent a more advanced condition in one reform, as France does in her system of identification of criminals, and England in her provisions for the incarceration of acquitted, although guilty, insane criminals, no one of them has a *system* founded upon the recent developments in science and upon modern knowledge, or possesses more than a fraction of the proposed system. While the legal attitude in European countries has been obtained, I do not know that any similar results have been secured as to the relation of the legal system of the United States to criminal anthropology.

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(To be continued.)